

**IN UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MISSOURI  
CENTRAL DIVISION**

TODD JANSON, et al., on behalf of	)	
themselves and on behalf of all others	)	
similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 2:10-cv-04018-NKL
	)	
LEGALZOOM.COM, INC.	)	
	)	
	)	
Defendant.	)	

**PLAINTIFFS’ MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF ANY  
CLASS MEMBERS WHO HAVE OPTED OUT OF THE CLASS**

Come now, Plaintiffs, by and through counsel, and for their Motion in Limine to Exclude the Testimony of Any Class Member who Opted Out of the Class, and states as follows:

**I. Introduction**

Discovery in this matter closed on March 9, 2011. See, Scheduling Order (Doc. #22). On July 15, 2011, months after discovery closed, Legalzoom submitted its First Supplemental Rule 26(a)(1)(A) disclosure to Plaintiffs on July 15, 2011. A copy of these disclosures is attached hereto as Exhibit 1 and incorporated herein by reference. In these new disclosures, Legalzoom identifies four individuals who chose to opt out of the case after getting notice of the pendency of the class action. Legalzoom claims that these individuals have information “regarding the use, operation, and content of LegalZoom’s website and its online document preparation services for consumers.” See, p. 3 of Exhibit 1.

Calling class members who opted of a class action is clearly improper for a number of reasons. First, the testimony of opt outs would be irrelevant. The use of LegalZoom’s

“document preparation services” will be testified to by others in this case; including plaintiffs and employees of the defendant. Class members who opted out of the case have nothing new to add to this case that would assist the jury in determining a fact in issue and their testimony would be cumulative at best. Second, to the extent that opt out witnesses have relevant information in this case, their testimony should be excluded due to the fact that probative value of any of their testimony is greatly outweighed by its prejudicial value. Finally, they were first disclosed to Plaintiffs after the close of discovery and slightly more than a month before trial. Accordingly, Plaintiffs did not have an adequate opportunity to depose them.

## **II. Argument**

“Federal Rule of Evidence 402 provides that irrelevant evidence is inadmissible.” *Wright v. Ark. & Mo. R.R. Co.*, 2009 U.S. App. LEXIS 16719, \*12 (8th Cir. July 29, 2009). “Evidence is relevant if it has ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’” *Id.* at \*12-13 (quoting Fed. R. Evid. 401). “A district court is given broad discretion to determine the relevance of evidentiary matters.” *Id.* at 13.

Rule 403 of the Federal Rules of Evidence provides “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Fed.R.Evid. 403. “Confusion of the issues warrants exclusion of relevant evidence if admission of the evidence would lead to litigation of collateral issues.” *Firemen's Fund Ins. Co. v. Thien*, 63 F.3d 754 (8<sup>th</sup> Cir. 1995). Rule 403 is concerned with unfair prejudice that has undue tendency to suggest decision on an

improper basis. *Pro batter Sports, LLC v. Joyner Technologies, Inc.*, 2007 WL 3285799 (N.D.Iowa, October 18, 2007).

The use of the services offered by Legalzoom is relevant in this case. Indeed, the plaintiffs will demonstrate to the jury through the testimony of plaintiffs, other properly disclosed witnesses, and Legalzoom's employees just what services Legalzoom provides in the preparation of legal documents for class members. Legalzoom has disclosed its own employees as well to describe how the document preparation process works. In light of this testimony, there is nothing the opt out class members have knowledge of that will assist the jury in determining a fact in issue.

Legalzoom, in an effort to do anything to confuse and mislead the jury, is not so subtly attempting to suggest that since these people didn't want to be a part of the class, there is nothing wrong with what Legalzoom is doing. These opt out witnesses will almost certainly be asked by Legalzoom whether they were happy with their experience, whether they thought Legalzoom was a lawyer and other similarly irrelevant questions. Quite simply, except for attempting to interject collateral and duplicative issues in front of the jury, opt out class members offer nothing to assist the jury in making factual determinations in this case. The only information that an opt out witness might have that is relevant to this case is simply to explain how the Legalzoom website works from the consumer's perspective. There are numerous other witnesses will testify to this as described above. Pursuant to Rule 403, this evidence should be excluded since it would be duplicative of evidence that will be offered by others. In addition, opt out witnesses would confuse the jury since they would not know what that means or why they opted out of the class. This would lead to litigation of collateral matters and likely prejudice the jury against the plaintiffs. Accordingly, plaintiffs respectfully request that the Court enter an Order prohibiting

opt out witnesses identified in Legalzoom's First Supplemental Rule 26 disclosure from being allowed to offer any testimony in this case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on August 2, 2011, I served this paper upon the following via this Court's ECF system:

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